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# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1944

## No. 982

STATE OF WISCONSIN ex Rel., ARTHUR A. BARTELT, Administrator of the Estate of Walter C. Bartelt, Deceased, *Appellant*,

*vs.*

STORMY S. THOMPSON, AUGUST B. PRIEGEL, ALEX C. RUFFING, RICHARD E. KRUG, JULIA McCARTHY, PAUL A. LUECK and WM. H. WENDT, THE ANNUITY AND PENSION BOARD OF THE EMPLOYES' RETIREMENT SYSTEM OF THE CITY OF MILWAUKEE

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

**STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE DECISION AND JUDGMENT APPEALED FROM AS REQUIRED BY RULE 12 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.**

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, the above named appellant files this

separate statement, particularly disclosing the basis on which it is contended the Supreme Court of the United States has jurisdiction on appeal to review the judgment appealed from. In support of the jurisdiction for such review, the appellant respectfully represents:

**a) Statutory Provision Sustaining Jurisdiction of Appeal**

The judgment to be reviewed is the final judgment of the Supreme Court of Wisconsin, the highest court of that state, in an action where there is drawn in question the validity of a statute of Wisconsin on the ground that, as applied by the appellees, it is repugnant to Section 10 of Article I of the Constitution of the United States forbidding state laws which impair the obligations of contract and to the Fourteenth Amendment to said Constitution forbidding state laws which deprive persons of their property without due process of law, and the decision and judgment appealed from is in favor of the validity of the statute so applied.

The case is, therefore, one in which, under the legislation in force when the Act of January 31, 1928 (45 Stats. 54) was passed to wit: Under *Section 237(a) of the Judicial Code (28 U. S. C. A., Section 344)*, a review could be had in the Supreme Court of the United States on writ of error as a matter of right. By the said *Act of January 31, 1928 (C. 14, Sec. 1, 45 Stat. 54)*, appeal was substituted for writ of error. In accordance with paragraph 2 of Rule 46 of the Rules of the Supreme Court of the United States, the facts supporting this right of appeal were stated in the petition for appeal.

The statute which thus supports jurisdiction of the appeal in this case is *Section 237(a) of the Federal Judicial Code*, as amended *(28 U. S. C. A.* Sec. 344(a)) so far as material, as follows:

"*Appellate jurisdiction of decrees of State courts*—
"(a) A final judgment or decree in any suit in the high-

est court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity may be reviewed by the Supreme Court upon appeal. The appeal shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of the state court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the appeal."

**b) State Statute the Validity of Which Is Involved**

The statute of Wisconsin, the validity of which is drawn in question is *Section 6 of Chapter 308 of the Laws of Wisconsin of 1941* construed by the appellees to limit the lump sum death benefits of membership in The Employes' Retirement System of the City of Milwaukee contracted before said statute of 1941 was enacted and adopted by the City of Milwaukee.

Walter C. Bartelt, relator's intestate, was an employee of the City of Milwaukee in 1937 and had been such employe for more than ten years. In August of 1937, the city adopted a voluntary contributed reserve retirement and death benefit system for its employes, the plan and terms of which had been stated in *Chapter 396, Laws of Wisconsin of 1937,* the relevant provisions of which are set forth in Appendix B of this statement. Employes could become members of the system or stay out. If they became members, they assigned contributions from their salaries to the reserves of the system under control of the appellees as trustees (Sec. 1, par. (c), App. B). Walter C. Bartelt elected to become a member as of January 1, 1938. The city

annually made contributions to the reserves actuarily determined to be sufficient, when added to the employes' contributions, and the income of the funds of the system, to pay the benefits specified (Sec. 8, pars. (b), (c) and (d), App. B).

The ordinary death benefit specified in the terms of the Act adopted in 1937 and in consideration for which Walter C. Bartelt assigned the contribution from his salary was as follows:

> "(4) ORDINARY DEATH BENEFIT. Upon the receipt of proper proofs of the death of a member in active service which is not the result of an accident in the actual performance of duty as defined in subsection (5) of this section, his accumulated contributions shall be paid to such person, if any, as he has nominated by written designation duly executed and filed with the board, otherwise to his executors or administrators, and if such member has completed one or more years of creditable service, there shall be so paid in addition a lump sum benefit of one-half the final average salary of such deceased member." (Sec. 5, Ch. 396.)

*Section 6 of Chapter 308, Laws of Wisconsin of 1941,* the state statute the validity of which is in question, amended the above quoted paragraph (4) of Section 5 of the Act by adding at the end thereof the words:- "but not to exceed $1000."

*Section 11 of said Chapter 308, Laws of Wisconsin of 1941,* was as follows:

> "This act shall take effect upon passage and publication except that the date on which the changes in 'Employes' Retirement System' as contained in this act shall become effective in any such city shall be the first Monday following the date on which the common council or other governing body of any such city shall by resolution, adopted by a majority vote, approve and

adopt the provisions of this act. Approved June 25, 1941."

The common council of the city adopted this amendment October 6, 1941 and the first Monday thereafter was October 13, 1941.

Walter C. Bartelt died December 20, 1942. Up to the time of his death he had contributed $934.15. The interest earned thereon was $78.43. His final average salary was $3420.00 per year.

Walter C. Bartelt, as of January 1, 1938, had elected to become a member of a system the terms of which assured him a death benefit of:

| | |
|---|---|
| His accumulated contributions and interest | $1012.58 |
| Lump sum benefit—half final average salary | 1710.00 |
| Ordinary Death Benefit | $2722.58 |

Appellees have construed the 1941 amendment to retroact upon memberships previously contracted and the judgment appealed from affirms this construction and limits the death benefit as follows:

| | |
|---|---|
| Accumulated contributions and interest | $1012.58 |
| Lump sum benefit—limited | 1000.00 |
| Ordinary Death Benefit | $2012.58 |

The funds of the system contributed by employes and city were, under the terms of the Act adopted by the city in 1937 and accepted by Walter C. Bartelt as of January 1, 1938, a special trust fund for the payment of the benefits, as was provided in *Section 9 of Chapter 396, Laws of Wisconsin of 1937*, as follows:

"The funds of the retirement system, which when taken in the aggregate shall constitute a special trust fund

to be held in reserve as provided in this Act for the payment of benefits shall be managed as follows:-"

The creation and maintenance of reserves adequate for payment of the benefits and the payment of the benefits were guaranteed and accepted by the city as its "obligations" when the city adopted and offered the system to its employes in 1937 (Sec. 10, App. B).

Walter C. Bartelt did not consent to the limitation of the lump sum death benefit to $1000.00 by *Sec. 6, Chapter 308, Laws of Wisconsin of 1941*, the statute here in question, nor was any substitute offered or granted to him to compensate for the asserted reduction of $710.00 in his death benefit.

### c) Date of Judgment to Be Reviewed and Date of Presentation of Petition for Appeal

The judgment of the Supreme Court of Wisconsin, which is to be examined, was expressed in the conclusion of the opinion of November 14, 1944 (Appendix A) and was entered on that date. Application for rehearing was made November 28, 1944, and this was denied January 16, 1945. Application for this appeal was made to the Chief Justice of the Supreme Court of Wisconsin on January 26, 1945, and the appeal was allowed by said Chief Justice on that date.

### d) Nature of the Case and Rulings of the Court Bringing the Case Within the Appellate Jurisdiction

The action was brought in the Circuit Court for Milwaukee County, Wisconsin for a writ of mandamus to compel the appellees, as the Annuity and Pension Board of the Employes' Retirement System of the City of Milwaukee, to pay the Walter C. Bartelt death benefit of $2722.58 in full and not as reduced to $2012.58 according to their interpretation of the statute in question. The Circuit Court of

Milwaukee County granted the peremptory writ and the appellees here appealed to the Supreme Court of Wisconsin, where the Circuit Court judgment was reversed.

1. Although the questions of impairment of the obligations of contract and deprivation of Bartelt's property in the trust fund of the system without due process of law were raised in the petition for the writ of mandamus, the allegations of which were admitted by appellees' motion to quash —equivalent to a general demurrer—and were reiterated in all of appellants' briefs, the Supreme Court of Wisconsin avoided discussion of them.

The Supreme Court of Wisconsin said (App. A):

> "The case turns upon the construction to be placed upon Sec. 5 (4) of Ch. 396 as amended by Ch. 308 of the Laws of 1941. If the relation *between the deceased and the retirement system* was contractual in its nature, then under the doctrine of *State ex rel. Dudgeon v. Levitan (1923), 181 Wis. 326, 193 N. W. 499,* the rights of the deceased under the contract could not be impaired by subsequent legislation. The relation of *Walter C. Bartelt to the city of Milwaukee* was not contractual as was the relation of the school principal to the city of Oshkosh in the case of *State ex rel. O'Neil v. Blied* (1925), 188 Wis. 442, 206 N. W. 213, relied upon by the relator." (Emphasis supplied)

The court correctly said the test was whether the relation between "the deceased and the *retirement system*" was contractual because, unlike the Miller law considered in *Dodge* v. *Board of Education,* 302 U. S. 74, 58 S. Ct. 98, there was here in question not a retirement feature of the employment relation, but the rights of a contributor to the special trust fund of a voluntary contributed reserve retirement and death benefit system. Appellant was not claiming anything from the city. His action was against the trustees of a special trust fund. Walter C. Bartelt's

rights in his character as member of the system were sought to be vindicated, not any claim as employe of the city.

But, after correctly stating the test to be applied, the Supreme Court of Wisconsin proceeded to analyze the employment relation of Walter C. Bartelt with the city of Milwaukee,—which was immaterial except to determine whether he was qualified as a city employe to join the system—a qualification conceded throughout.

Whether the civil service tenure was of the same nature as the school principal's contract was not germane to the question of "the relation between the deceased and the *retirement system*".

The teacher's relation to the Teachers' Retirement System in Wisconsin, as distinguished from the teacher's tenure of employment, is unquestionably contractual. The retirement system of the city of Milwaukee here in question was written in the likeness of the Teachers' Retirement Act of the state. When a teacher sought to show, by reference to the cases holding the Teachers' Retirement Act contractual, that his tenure was also contractual, the court made the distinction clear in *Morrison* v. *Board of Education*, 237 Wis. 483, 297 N. W. 383, as follows:

> (237 Wis. p. 489) "Plaintiff relies upon the cases of *State ex rel. Dudgeon v. Levitan*, 181 Wis. 326, 193 N. W. 499; *State ex rel. O'Neil v. Blied*, 188 Wis. 442, 206 N. W. 213; and *State ex rel. Nyberg v. School Directors*, 190 Wis. 570, 209 N. W. 683, as holding that such statutes are contractual. The *Dudgeon* and *O'Neil* Cases, supra, involve the Teachers' Retirement Act, a wholly different law and one quite distinguishable from the Teachers' Tenure Act. The Teachers' Retirement Act sets up a complicated system of payments by the teacher and by the state available in the form of annuities to the teacher on retirement. Sec. 42.42, Stats., requires that each contract made after the law takes effect shall be subject to its terms, and that in con-

tracts made prior to that time no deduction under the law shall be made without the consent of the teacher. The Teachers' Retirement Act sufficiently evidences a purpose to create contractual rights in teachers, and cases so sustaining it are not in point here."

The quotations of the above at page 22 of Respondent's Brief and again at page 10 of Respondent's Argument in Support of Motion for Rehearing in the Supreme Court of Wisconsin were not commented upon.

The Employes' Retirement Act of the City of Milwaukee, like the Teachers' Retirement Act, sets up a complicated system of payments by the member and the city and requires that each employment by the city after adoption of the Act shall be subject to its terms and that in no employment prior to adoption of the Act shall any salary deduction be made without the employe's consent. These cases are indistinguishable.

The question whether the relation of Walter C. Bartelt to the retirement system and to appellees, as its trustees, was contractual is one upon which the Supreme Court of the United States must reach an independent judgment.

*Dodge* v. *Board of Education*, 302 U. S. 74, 58 S. Ct. 98, 82 L. Ed. 57;

*Phelps* v. *Board of Education*, 300 U. S. 319, 57 S. Ct. 483, 81 L. Ed. 674;

*Larson* v. *South Dakota*, 278 U. S. 429, 433, 49 S. Ct. 196, 197, 73 L. Ed. 441.

This appeal is thus distinctly within the jurisdiction on the question of impairment of the obligations of contract in violation of *Section 10 of Article I of the Constitution of the United States.*

2. The question whether appellant was deprived of his property and the property of his intestate without due process of law by the statute in question, *Section 6 of Chapter*

*308, Laws of Wisconsin of 1941,* was presented to the Supreme Court of Wisconsin. It was passed upon by saying:

> "At the time of the amendment in 1941, the deceased employe had no vested right to the contribution provided for by subsec. (4). While Sec. 10 which has been already quoted, makes the payment of the funds therein described an obligation of the city, that obligation does not vest until the death of the member and for that reason, neither he nor his estate has a vested interest in the benefit to be paid by the city pursuant to the provision of subsec. (4)." (App. A)

This was not an action against the city. No contribution from the city was sought by the writ of mandamus. The action was against the appellees, the Annuity and Pension Board, who were trustees of the reserves of the system, constituted a special trust fund by the Laws of 1937 and the membership contracted thereunder.

The contributions toward Bartelt's death benefit had all been made by the city year by year from 1937 to the date of Bartelt's death in December, 1942. These contributions were annually made on the actuarial basis established in the terms of *Chapter 396, Laws of Wisconsin of 1937.* (See Sec. 8, Chapter 396, Laws of 1937, in Appendix B, particularly pension accumulation fund provisions in subsection (b), (c) and (d).)

The actuarial determinations have not been questioned by the appellees whose responsibility they are. The contributions annually made by the city up to the date of Bartelt's death had thus put into the reserves of the system under the control of the appellees the full sum of the lump sum death benefit of $1710.00 pertaining to Bartelt's membership—half his final average salary.

The issue was not as to any additional contribution by the city, but as to Bartelt's right in the accumulated contri-

butions already made. By transfer of these funds to the system, legal title had passed from the city to appellees as trustees.

The Supreme Court of Wisconsin did not determine whether appellant and his intestate had a property right in the trust fund under appellees' control. It is respectfully contended that the beneficial interest in the trust fund of the reserves of the system and the right to be paid the full death benefit for the purchase of which the annual contributions of employe and city both had been measured, is property.

It is for the Supreme Court of the United States under its appellate jurisdiction to determine whether appellant's right was property protected by the Fourteenth Amendment of the Constitution of the United States. The similar Fifth Amendment prohibition against taking property without due process of law by act of Congress has been construed as a protection against laws cutting down death benefits in the war risk insurance system of the United States, and it is contended that the following decision supports the jurisdiction here invoked.

*Lynch* v. *United States,* 292 U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 and cases cited therein.

3. Rule 12 of the Rules of the Supreme Court of the United States, in requiring a statement of the nature of the case and the rulings of the Court which were such as to bring the case within the appellate jurisdiction, indicates the necessity of pointing out the fundamental error of the Supreme Court of Wisconsin. That error was its failure to recognize the distinction between rights of an employe to future benefits which have been offered to him by his employer as a feature of the employment relation and the right of a member of a voluntary contributed reserve retirement system contributed as a trust fund under the control

of independent trustees to the benefits for which funds have been provided by actuarily determined past contributions.

*Dodge* v. *Board of Education*, 302 U. S. 74, 58 S. Ct. 98, 82 L. Ed. 57 and *State ex rel McCarty* v. *Gantter*, 240 Wis. 548, 4 N. W. (2d) 153 applying it and relied upon by the Supreme Court of Wisconsin, decide questions of retirement benefit features of the employment relation. They do not deal with rights in a funded retirement system to which both employe and employer have voluntarily committed themselves and to which both have made annual contributions actuarily determined to be sufficient to purchase stated benefits.

Such funded retirement systems are in legal substance identical with life insurance; and where, as here, no reservation of any right to modify or change is made, the death benefit is fixed contractually and as property.

### e) Grounds Upon Which It Is Contended That Qusetions Involved Are Substantial

The dollar amount of the reduction of the Walter C. Bartelt death benefit it $710.00. The demand appended to the petition for writ of mandamus (R. —) shows that on July 13, 1943 there were at least 14 other deceased members of the system and their beneficiaries similarly situated.

The Constitutional questions are fundamental to the case. There is no question of fact. The issues of interpretation are all inextricably involved in the basic Constitutional questions.

While the retirement system here involved has as its members municipal employes, rights in any funded retirement or pension system may be affected by this case treated as a precedent. The thousands of pension and profit-sharing plans adopted by industrial corporations throughout the nation to avail themselves of deductions from income

for reduction of Federal income taxes under *Sec. 165 of the Internal Revenue Code,* are essentially funded retirement systems.

Have the members of such pension systems or plans any protected contract or property rights?

**f) Stage of Proceedings and Manner of Raising Questions to Be Reviewed**

On July 13, 1943, before commencement of the action, a demand was made on appellees which is a part of the petition for the writ of mandamus (R. —). The Constitutional questions were raised in that demand as follows:

> "Such retroactive application would deprive Walter C. Bartelt and the administrator of his estate, as well as at least 14 other deceased members of the System and their beneficiaries and personal representatives similarly situated as well as members now living who had membership before October 13, 1941, of their property without due process of law and deny to them the equal protection of the laws in violation of Sections 1, 9 and 22 of Article I of the Wisconsin Constitution and the Fourteenth Amendment of the Constitution of the United States of America. Such application would likewise be a state law impairing the obligation of contracts in violation of Section 10 of Article I of the Constitution of the United States of America and void for that additional reason."

These questions were raised in the petition for writ of mandamus filed October 4, 1943, by which this case was begun in the Circuit Court of Milwaukee County, Wisconsin. Paragraph 19 of that petition was as follows:

> "19. As petitioner is informed and believes, the amendment to Chapter 396, Laws of 1937, by Chapter 308, Laws of 1941, was not intended to be retroactive to apply to memberships elected before the date of the amendment and, if applied, as the defendants inter-

> pret it, to reduce the death benefit, the particular provision so applied is void because it deprived Walter C. Bartelt and deprives petitioner of their property without due process of law and denies to them the equal protection of the laws in violation of Sections 1, 9 and 22 of Article I of the Wisconsin Constitution and the Fourteenth Amendment to the Constitution of the United States, and because it impairs the obligations of the contract between the parties interested in the Retirement System in violation of Section 10 of Article I of the Constitution of the United States."

In the Supreme Court of Wisconsin these questions were raised in the briefs which furnish the only means in that court of presenting contentions. The Circuit Court for Milwaukee County had granted the writ of mandamus. The appeal to the Supreme Court of Wisconsin was taken by the appellees here. It is thus in the Respondents' Brief in that court and in Respondents' Argument to Support the Motion for Rehearing in that court that appellant presented the contentions. Par. I (b) of the argument in Respondent's Brief was summarized in the headnote at page 22 of that brief as follows:

> "(b) The death benefit purchased by Walter C. Bartelt in 1938 was a contract as binding upon the City and the members and trustees of the System as a similar commitment would bind a private insurer; and any law attempting substantially to reduce the death benefit without Walter C. Bartelt's consent is a law impairing the obligation of contract and void under Article I, Section 12 of the Wisconsin Constitution and Article I, Section 10 of the Constitution of the United States."

Among other presentations of the contention that the appellees' interpretation of *Sec. 6 of Chapter 308, Laws of Wisconsin of 1941* deprived appellant and his intestate of their property without due process of law, is the headnote

to Part IV of Respondent's Argument in Support of Motion for Rehearing at page 8 thereof, as follows:

> "The 1941 limitation of lump sum death benefits to $1000 if applied backward to reduce the City's past contributions of 1941, 1940, 1939 and 1938, would take Bartelt's property—part of his beneficial interest in the trust—without due process of law."

The rules of the Supreme Court of Wisconsin do not provide for assignments of error or statements of points, but in lieu thereof require the issues to be reduced to brief questions (Rule 6, Rules of Supreme Court of Wisconsin). Appellant here, at page 1 of Respondent's Brief in that court stated the question at issue simply:

> "Is the death benefit in a voluntary contributed reserve retirement system for city employes validly reduced without the member's consent by legislation adopted after the membership was contracted?"

As shown above in part e) of this statement, appellant's contentions were sustained in the Circuit Court of Milwaukee County but were passed upon by the Supreme Court of Wisconsin only in its opinion of November 14, 1944 (App. A), and its denial of the motion for rehearing on January 16, 1945. The Supreme Court of Wisconsin held in its opinion (App. A) that the deceased had no vested interest in the contributions of the city; that the relation between the parties was not contractual; and that "it was within the competency of the legislature to prescribe a different amount than that prescribed in *Ch. 396 of the Laws of 1937*, at any time before the death of a member". (App. A, second last paragraph; and R. ——). In denying the motion for rehearing the court referred to the Constitutional contentions, but said that it found no federal question involved. (App. A and R. ——.)

**g) Opinion Delivered by Supreme Court of Wisconsin**

Appended hereto in Appendix A is a copy of the opinio of the Supreme Court of the State of Wisconsin delivere upon the rendering of the judgment to be reviewed. Ther were no other opinions. The Circuit Court of Milwauke County made its decision denying the motion to quash th alternative writ and adjudging that plaintiff have peremptory writ of mandamus without opinion.

It is contended therefore that the questions of the re pugnancy of *Sec. 6, Chapter 308, Laws of Wisconsin o 1941* to *Sec. 10, Article I and the Fourteenth Amendmen of the Constitution of the United States* were timely raise were substantial and the decision to be examined held th statute valid. Accordingly, the appeal is properly allowe and the jurisdiction of the Supreme Court of the Unite States to examine and reverse the judgment of the Suprem Court of Wisconsin of November 14, 1944, is clear.

Respectfully submitted,

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## APPENDIX A

### OPINION OF SUPREME COURT OF WISCONSIN

November 14, 1944

(246 Wis. 11, 16 N. W. 2nd 420)

No. 35

August Term, 1944

### STATE OF WISCONSIN: IN SUPREME COURT

STATE ex Rel., ARTHUR A. BARTELT, Adm'r. of the Estate of Walter C. Bartelt, Deceased, Respondent,

vs.

STORMY S. THOMPSON et al., the Annuity and Pension Board of the Employes' Retirement System of the City of Milwaukee, Appellants

Appeal from a Judgment of the Circuit Court for Milwaukee County: Gustave G. Gehrz, Circuit Judge. *Reversed*

This action was begun on the 4th day of October, 1943, by Arthur A. Bartelt, relator, against the Annuity and Pension Board of the Employes' Retirement System of the City of Milwaukee, to require the payment of $2,722.58 to the relator as administrator of the estate of Walter C. Bartelt, deceased, pursuant to the provisions of ch. 396 of the Laws of 1937. The trial court found in favor of the relator and from a judgment in his favor, entered on March 31, 1944, the defendants appeal.

The facts will be stated in the opinion.

ROSENBERRY, C. J.

The deceased, Walter C. Bartelt, had been an employee of the city of Milwaukee since May 18, 1926. He elected to become a member of the Employes' Retirement System on January 1, 1938, and continued in active membership in the

system until his death on December 20, 1942. During his active membership in the system his accumulated contributions amounted to $1,012.58. With respect to these contributions there is no controversy.

Section 8 (1) (a) of said ch. 396 provides:

"Annuity savings fund" is defined as follows:

"A fund in which shall be accumulated contributions from the compensation of members to provide for their annuities. Upon the basis of such tables as the board (Annuity and Pension Board) shall adopt, and regular interest, the actuary of the retirement system shall determine for each member the proportion of earnable compensation which, when deducted from each payment of his prospective earnable compensation prior to his attainment of age sixty and accumulated at regular interest until his attainment of such age, shall be computed to provide at that time an annuity equal to the pension to which he will be entitled at that age on account of his service as a member. Such proportion of compensation shall be computed to remain constant * * *"

Ordinary "death benefit" was defined by sec. 5 (4) of the act as follows:

"Upon the receipt of proper proofs of the death of a member in active service which is not the result of an accident in the actual performance of duty as defined in subsection (5) of this section, his accumulated contributions shall be paid to such person, if any, as he has nominated by written designation duly executed and filed with the board, otherwise to his executors or administrators, and if such member has completed one or more years of creditable service, there shall be so paid in addition a lump sum benefit of one-half the final average salary of such deceased member."

Said ch. 396 was amended on June 28, 1941, by ch. 308, of the Laws of 1941, by adding at the end of subsec. (4) the words "but not to exceed one thousand dollars". The relator relies heavily upon sec. 10, ch. 396, Guaranty and Supervision, which is as follows:

"The creation and maintenance of reserves in the pension accumulation fund, the maintenance of annuity re-

serves and pension reserves as provided for, and regular interest creditable as provided for to the various funds, and the payment of all pensions, annuities, retirement allowances, refunds and other benefits granted under the provisions of this Act, and all expenses in connection with the administration and operation of the retirement system are hereby made obligations of the city. The various funds of the retirement system shall be subject to periodic examination by the insurance department of the State of Wisconsin, for the purpose of insuring that the technical features of this Act are observed."

It was optional with the city employe whether he would become a member of the retirement system. If he elected to become a member, he thereby consented to have deducted from his salary a specified amount.

Under these provisions of the statute, the relator contends that by electing to become a member of the retirement system, the relation between the deceased and the city retirement system was contractual in its nature; that the relation being contractual, the legislature was without power to reduce the amount of the city's contribution to the fund. In this case the estate of the deceased employe under the act as originally passed would have amounted to $2,722.58, of which amount $1,710 would be contributed by the city, being one-half of his final average salary at $3,420. As amended by ch. 308 of the Laws of 1941, the city's contribution would be limited to $1,000.

The case turns upon the construction to be placed upon sec. 5 (4) of ch. 396 as amended by ch. 308 of the Laws of 1941. If the relation between the deceased and the retirement system was contractual in its nature, then under the doctrine of *State ex rel. Dudgeon* v. *Levitan* (1923), 181 Wis. 326, 193 N. W. 499, the rights of the deceased under the contract could not be impaired by subsequent legislation. The relation of Walter C. Bartelt to the city of Milwaukee was not contractual as was the relation of the school principal to the city of Oshkosh in the case of *State ex rel. O'Neil* v. *Blied* (1925), 188 Wis. 442, 206 N. W. 213, relied upon by the relator.

In this case the deceased was an employe for no specified period but held his position at the will of the city so that the cases of *State ex rel. O'Neil* v. *Blied* and *State ex rel. Dudgeon* v. *Levitan, supra,* are not in point.

This case is ruled by *State ex rel. McCarty* v. *Gantter* (1942), 240 Wis. 548, 4 N. W. (2) 153.

It is clear that under the provisions of sec. 5 (4) the right to receive a contribution from the city does not arise until the proper proofs of death of a member are filed. At the time of the amendment in 1941, the deceased employe had no vested right to the contribution provided for by subsec. (4). While sec. 10 which has been already quoted, makes the payment of the funds therein described an obligation of the city, that obligation does not vest until the death of the member and for that reason, neither he nor his estate has a vested interest in the benefit to be paid by the city pursuant to the provisions of subsec. (4). The deceased having no vested interest in the contribution of the city and the relation between the parties not being contractual, it was within the competency of the legislature to prescribe a different amount than that prescribed in ch. 396 of the Laws of 1937, at any time before the death of a member. The Annuity and Pension Board properly applied the provisions of ch. 396 of the Laws of 1937 as amended by allowing the relator the sum of $2,012.58 and its action should have been affirmed.

*By the Court.*—The judgment appealed from is reversed and cause remanded with directions to enter judgment in accordance with this opinion.

January 16, 1945.

*By the Court:* We have considered the contention of the plaintiff to the effect that there has been a violation of Art. I, Sec. 10 and the Fourteenth Amendment to the Constitution of the United States and we find no federal question involved.

Motion for rehearing denied with $25.00 costs.

## APPENDIX B

THE EMPLOYES' RETIREMENT ACT OF THE CITY OF MILWAUKEE, CHAPTER 396, LAWS OF WISCONSIN OF 1937 (Irrelevant provisions omitted).

"Published July 15, 1937.

CHAPTER 396

AN ACT relating to the establishment and administration of retirement systems in cities of the first class for the payment of benefits to the employes of such cities, and to the widows and children of such employes.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

SECTION 1. RETIREMENT SYSTEM IN CITIES OF THE FIRST CLASS; DEFINITIONS. In each city of the first class a retirement system shall be established and maintained by such city for the payment of benefits to the employes of such city and to the widows and children of such employes, except employes who are or who become contributors to, participants in, or beneficiaries of any other pension, annuity or retirement fund in operation in the state by provision of law enacted by the legislature or by any municipality of this state. The funds of the retirement system herein created shall be derived, administered and disbursed in accordance with the provisions of this act. Except where the context plainly requires different meaning, the following words and phrases shall have the following meanings:

(1) 'Retirement system' shall mean the employees' retirement system of the city in which such system provided for herein is established.

(2) 'Board' shall mean the 'annuity and pension board' provided for in section 7 of this act to administer the retirement system.

(3) (a) 'City' shall mean the city in which the retirement system as herein provided is established.

(b) 'City agency' shall mean any board, commission, division, department, office or agency of the city government, by which an employe of the city is paid.

(4) 'Employe' shall mean any person employed by the city or city agency as hereinbefore defined in regular service at a wage or salary payable at stated intervals, but shall not include any person in the city service elected by the vote of the people. In the event of a question arising as to the right of any person in the service of the city to be classified as an employe under this act, the decision of the board shall be final.

(5) 'Member' shall mean any person included in the membership of the retirement system as provided in section 3 of this act.

(6) 'Annuity' shall mean the annual payments for life derived from contributions made by a member. All annuities shall be paid in equal monthly instalments.

(7) 'Pension' shall mean the annual payments for life derived from contributions made by the city. All pensions shall be paid in equal monthly instalments.

(8) 'Retirement allowance' shall mean the annuity plus the pension, or any optional benefit payable in lieu thereof.

(9) 'Earnable compensation' shall mean the full rate of compensation that would be payable to a member if he worked the full normal working time for his position. In cases where compensation includes maintenance, the board may in its discretion fix the value of that part of the compensation not payable in money, and in the event that such board does not exercise its discretion 'earnable compensation' shall mean the full rate of compensation payable in money.

(10) 'Final average salary' shall mean the average annual earnable compensation of a member during his last five years of creditable service immediately preceding his date of retirement, or, if he should have less than five years of creditable service, then his average annual earnable compensation during his creditable service.

(11) 'Service' shall mean service as an employe and paid for by the city or city agency.

(12) 'Prior service' shall mean the service of a member as an employe rendered prior to the date of the establishment of the retirement system, either in the service of the city or city agency, certified on a prior service certificate and allowable as provided in section 4 of this act.

(13) 'Membership service' shall mean service as an employe since last becoming a member of the retirement system and on account of which contributions are made by the city.

(14) 'Creditable service' shall mean prior service plus membership service for which credit is allowable under section 4 of this act.

(15) 'Accumulated contributions' shall mean the sum of the contributions, together with regular interest, of a member deducted from his salary and held for his credit in the annuity savings fund provided in section 8 of this act.

(16) 'Regular interest' shall mean interest at such rate as may be set from time to time by the board in accordance with section 9 of this act.

(17) 'Medical council' shall mean the council of physicians provided for in section 7 of this act.

(18) 'Actuarial equivalent' shall mean a benefit of equivalent value when computed with regular interest on the basis of the mortality tables adopted by the board.

(19) 'Beneficiary' shall mean any person in receipt of a retirement allowance, or other benefit, as provided by this act.

(20) The masculine pronoun shall include the feminine.

Section 2. Effective Date. The date on which the retirement system provided for in this act shall become effective in any such city shall be the first day of January next following the date on which the common council or other governing body of any such city shall, by resolution,

adopted by a majority vote, approve and adopt the provisions of this act. The retirement system shall be known as the 'Employes' Retirement System' of the city by which it is established, and by such name shall all of its business be transacted, all its funds invested, and all its cash and securities and other property held in trust for the purpose for which received.

SECTION 3. MEMBERSHIP. (1) *Present Employes; Election.* Any person who is an employe on the date this act becomes effective in any such city shall, except as hereinafter provided, be eligible for membership and shall become a member as of such date unless, within a period of thirty days thereafter, he files with the board on a blank provided by the board for that purpose written election not to become a member which shall constitute a waiver of all present and prospective benefits which would otherwise inure to him by his participation in the system.

(2) *Future Employes.* Any person who becomes an employe after the date of establishment of the retirement system shall become a member as a condition of his employment.

(3) *Other Employes.* Any employe whose membership in the retirement system is contingent on his own election and who elects not to participate may later become a member provided he passes such medical examination as the board may require. If such employe becomes a member within one year after the effective date of establishment of the retirement system in any such city, he shall be eligible for prior service credit, but if he does not become a member within such period, he shall not be eligible for prior service credit.

(4) *Denial of Membership.* The board may, in its discretion, admit to membership any class of employes whose compensation is only partly paid by the city or who are serving on a temporary basis, and it may, in its discretion, make optional with persons in any such class their individual entrance into membership.

(5) *Report of City Officials.* It shall be the duty of the head of each agency of the city government employing persons who are members or are entitled to become members to submit to the board such statements as the board shall require, of the name, title, compensation, duties, date of birth, and length of service of each such person employed by such agency.

(6) *Termination of Membership.* Should any member in a period of ten consecutive years after last becoming a member be absent from service more than five years, or should he withdraw more than fifty per centum of his accumulated contributions, or should he become a beneficiary or die, he shall thereupon cease to be a member.

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SECTION 5. BENEFITS. * * *

(4) *Ordinary Death Benefit.* Upon the receipt of proper proofs of the death of a member in active service which is not the result of an accident in the actual performance of duty as defined in subsection (5) of this section, his accumulated contributions shall be paid to such person, if any, as he has nominated by written designation duly executed and filed with the board, otherwise to his executors or administrators, and if such member has completed one or more years of creditable service, there shall be so paid in addition a lump sum benefit of one-half the final average salary of such deceased member.

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SECTION 7. ADMINISTRATION. * * *

(14) *Periodic Valuations; Tables and Rates Thereon.* At least once in the three year period after the retirement system provided for in this act shall become effective in any such city and at least once in each five year period thereafter, the actuary shall make an actuarial investigation into the mortality, service and compensation experience of the members and beneficiaries of the retirement system, and shall make a valuation of the assets and liabilities of the

funds of the system, and taking into account the results of such investigation and valuation, the board shall

(a) Adopt for the retirement system such mortality, service and other tables as shall be deemed necessary;

(b) Certify the rates of contribution payable by members under the provisions of this act; and

(c) Certify the rates of contribution payable by the city on account of new entrants.

(15) *Annual Valuations by the Board.* On the basis of such tables as the board shall adopt, the actuary shall make an annual valuation of the assets and liabilities of the funds of the retirement system.

SECTION 8. METHOD OF FINANCING. All of the assets of the retirement system shall be credited according to the purpose for which they are held to one of five funds, namely, the annuity savings fund, the annuity reserve fund, the pension accumulation fund, the pension reserve fund and the expense fund.

(1) *Annuity Savings Fund.* (a) The annuity savings fund shall be a fund in which shall be accumulated contributions from the compensation of members to provide for their annuities. Upon the basis of such tables as the board shall adopt, and regular interest, the actuary of the retirement system shall determine for each member the proportion of earnable compensation which, when deducted from each payment of his prospective earnable compensation prior to his attainment of age sixty and accumulated at regular interest until his attainment of such age, shall be computed to provide at that time an annuity equal to the pension to which he will be entitled at that age on account of his service as a member. Such proportion of compensation shall be computed to remain constant. The proportion so computed for a member age fifty-nine shall also be applied to a member who has attained a greater age before he becomes a member of the retirement system.

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(c) The deductions provided for herein shall be made notwithstanding the minimum compensation provided for by law for any member shall be reduced thereby. Every member shall be deemed to consent and agree to the deductions made and provided for herein and shall receipt for his full salary or compensation, and payment of salary or compensation less said deduction shall be a full and complete discharge and acquittance of all claims and demands whatsoever for the services rendered by such person during the period covered by such payment, except as to the benefits provided under this act. The head of each city agency shall certify to the board on each and every payroll or in such manner as the board may prescribe, the amounts to be deducted; and each of said amounts shall be deducted, and when deducted shall be paid into said annuity savings fund, and shall be credited, together with regular interest thereon to the individual account of the member from whose compensation such deduction was made.

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(3) *Pension Accumulation Fund.* (a) The pension accumulation fund shall be the fund in which shall be accumulated all reserves for the payment of all pensions and other benefits payable from contributions made by the city and from which shall be paid all pensions and other benefits on account of members with prior service credit and the lump sum death benefits payable from contributions made by the city. Contributions to and payments from the pension accumulation fund shall be made as follows:

(b) On account of each member there shall be paid annually into the pension accumulation fund by the city for the preceding fiscal year an amount equal to a certain percentage of the earnable compensation of each member to be known as the 'normal contribution', and an additional amount equal to a percentage of his earnable compensation to be known as the 'accrued liability contribution'. The rates per centum of such contributions shall be fixed on the basis of the liabilities of the retirement system as shown by actuarial valuation. Until the first valuation the normal contribution shall be three and four-tenths per centum, and

the accrued liability contribution shall be three and one-tenth per centum of the annual compensation of all members.

(c) On the basis of regular interest and of such mortality and other tables as shall be adopted by the board, the actuary engaged by the board to make each valuation required by this act during the period over which the accrued liability contribution is payable, immediately after making such valuation, shall determine the uniform and constant percentage of the earnable compensation of the average new entrant which, if contributed on the basis of compensation of such new entrant thoroughout his entire period of active service, would be sufficient to provide for the payment of any death benefit or pension payable on his account. The rate per centum so determined shall be known as the 'normal contribution' rate. After the accrued liability contribution has ceased to be payable, the normal contribution rate shall be the rate per centum of the earnable compensation of all members obtained by deducting from the total liabilities of the pension accumulation fund the amount of the funds in hand to the credit of that fund and dividing the remainder by one per centum of the present value of the prospective future salaries of all members as computed at regular interest on the basis of the mortality and service tables adopted by the board. The normal rate of contribution shall be determined by the actuary after each valuation.

(d) Immediately succeeding the first valuation, the actuary engaged by the board shall compute the rate per centum of the total annual compensation of all members which is equivalent to four per centum of the amount of the total pension and death benefit liability on account of all members and beneficiaries which is not dischargeable by the aforesaid normal contribution made on account of such members during the remainder of their active service. The rate per centum originally so determined shall be known as the 'accrued liability contribution' rate.

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(6) *City Contributions.* (a) On or before the first day of September in each year, the board shall certify to the common council or other governing body the amounts which will become due and payable during the year next following to each of the funds of the retirement system, together with a statement of the percentage of the payroll of all members, which is equivalent to the total amount. The amount so ascertained shall be included by the common council or other governing body in their budget and shall be appropriated and paid to the retirement system by the city in the fiscal year next following.

(b) In order to meet the requirements of this act the common council or other governing body is authorized to levy a tax annually, which tax shall be in addition to all other taxes such common council or other governing body has been authorized to levy upon all taxable property, real and personal. Such tax shall be levied and collected at the same time and in the same manner as other city taxes are levied and collected according to the law.

SECTION 9. MANAGEMENT OF FUNDS. The funds of the retirement system, which, when taken in the aggregate shall constitute a special trust fund to be held in reserve as provided in this act for the payment of benefits, shall be managed as follows:

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(4) *Custodian of Funds; Withdrawals.* The city treasurer shall be the custodian of the several funds of the retirement system and shall give such bond for the proper performance of his duties as is required by the board. All payments from said funds shall be made by him only upon vouchers signed by two persons designated by the board. A duly attested copy of a resolution of the board designating such persons and bearing on its face specimen signatures of such persons shall be filed with the treasurer as his authority for making payments upon such vouchers. No voucher shall be drawn unless it has previously been authorized by resolution of the board.

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SECTION 10. GUARANTY AND SUPERVISION. The creation and maintenance of reserves in the pension accumulation fund, the maintenance of annuity reserves and pension reserves as provided for, and regular interest creditable as provided for to the various funds, and the payment of all pensions, annuities, retirement allowances, refunds and other benefits granted under the provisions of this act, and all expenses in connection with the administration and operation of the retirement system are hereby made obligations of the city. The various funds of the retirement system shall be subject to periodic examination by the insurance department of the state of Wisconsin, for the purpose of insuring that the technical features of this act are observed.

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SECTION 15. This act shall take effect upon passage and publication.

Approved July 13, 1937."

(This Act was approved and adopted by resolution of the Common Council of the City of Milwaukee on August 2, 1937.)

(6895)

No. 982. WISCONSIN EX REL. BARTELT, ADMINISTRATOR, *v.* THOMPSON ET AL. Appeal from the Supreme Court of Wisconsin. March 26, 1945. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Phelps* v. *Board of Education*, 300 U. S. 319, 322–323; *Dodge* v. *Board of Education*, 302 U. S. 74, 79. *Mr. Herbert C. Hirschboeck* for appellant. Reported below: 246 Wis. 11, 16 N. W. 2d 420.